No. 14190

United States
Court of Appeals
for the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING CO., INC., a Corporation,

Appellant,

vs.

TERRITORY OF ALASKA,

Appellee,

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Co-Partners Doing Business as the NORTHERN CONSTRUCTION ASSOCIATION, and ELLSWORTH E. SAXTON, as Agent for Said Association,

Appellants,

vs.

TERRITORY OF ALASKA,

Appellee.

Transcript of Record

Appeals from the District Court for the District of Alaska, Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-2-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska, Third Division

No. A-8385

ANCHORAGE SAND AND GRAVEL COMPANY, INC., an Alaskan Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR.; LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON, AND GRACE D. SAXTON, Co-Partners Doing Business as NORTHERN CONSTRUCTION ASSOCIATION; SUPERIOR SAND AND GRAVEL MINING CO., INC.; and the TERRITORY OF ALASKA,

Defendants.

COMPLAINT

Comes now the above-named plaintiff and for cause of action against the defendants, alleges and complains as follows:

I.

That the plaintiff is a Corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska, having its principal place of business at Anchorage, Alaska; that it has paid its corporation tax last past due and has filed its an-

nual report for the last calendar year as required by the laws of the Territory of Alaska.

II.

That on the 10th day of April, 1950, the plaintiff entered into a written contract with the United States of America for the purchase of pit run gravel for a period of five years from the following described property:

> The Southeast Quarter of the Northwest Quarter of the Southeast Quarter; the North Half of the Southwest Quarter of the Northwest Quarter of the Southeast Quarter; and the North Half of the South Half of the Southwest Quarter of the Northwest Quarter of the Southeast Quarter of Section Sixteen (16), Township Thirteen (13) North, Range Three (3) West, Seward Base Meridian, Territory of Alaska.

That immediately thereafter the plaintiff entered upon said property and ever since has been, and now is in the sole and exclusive possession of the same.

III.

That the plaintiff discovered sand and gravel upon the above-described property on March 2, 1950; that location notices were posted on November 27, 1950, and a Placer Location Certificate was filed in the office of the U. S. Commissioner and Ex Officio Recorder for the Anchorage Recording Precinct, Territory of Alaska, on November 30, 1950,

at 4:50 p.m., and recorded in Volume 53 at page 106 of Precinct records.

IV.

That the plaintiff on the 27th day of November, 1950, discovered sand and gravel upon the following described property, known as Claim No. 2:

> The claim begins at a point 1320 feet west of the Corner Stake between Sections 16, 15, 21 and 22, Township 13 North, Range 3 West, Seward Base Meridian, and directly on said section line, designated by Corner Post No. 1; thence 1320 feet north to a stake marked No. 2, Discovery No. 2; thence 660 feet west to a stake marked No. 3, Discovery No. 2; thence south 660 feet to a stake marked No. 4, Discovery No. 2; thence 165.2 feet east, more or less, to a stake marked No. 5, Discovery No. 2; thence south 660 feet to East-West section line to a stake marked No. 6, Discovery No. 2; (this stake is offset thirty feet north of section line the same as Stake No. 1); thence east 494.8 feet, more or less, to point of beginning.

That location notices were posted on November 28, 1950, and a Placer Location Certificate was filed in the office of the U. S. Commissioner and Ex Officio Recorder for the Anchorage Recording Precinct, Territory of Alaska, on November 30, 1950, at 4:50 p.m., and recorded in Volume 53 at page 109 of Precinct records.

V.

That thereafter the defendants, Northern Con-

struction Association and Superior Sand and Gravel Mining Co., Inc., filed notices of location upon the entire Southeast Quarter of Section Sixteen (16), Township Thirteen (13) North, Range Three (3) West, Seward Base Meridian, as aforesaid, which embraced both claims of the plaintiff theretofore discovered by the plaintiff; that the discoveries of the plaintiff are prior to and paramount to any claims of said defendants.

VI.

That on the 21st day of August, 1952, the defendants known as the Northern Construction Association filed in the United States Land Office at Anchorage, Alaska, their application for a United States patent for said placer mining claim, and thereafter did publish in the Anchorage Daily Times, a daily newspaper published in Anchorage, Alaska, a notice of said application, the first insertion therein of said notice being in the issue of the 15th day of October, 1952.

VII.

That on the 9th day of December, 1952, plaintiff filed in the United States Land Office its adverse claim and protest against the allowance of a mineral entry on said application, and that said adverse claim and protest are now pending in the United States Land Office.

VIII.

That this action is brought in support of said adverse claim.

IX.

That the defendant, Territory of Alaska, has an interest in the above-described property for the reason that Section 16, described as aforesaid, has been set aside for the Territory of Alaska to use for school purposes.

Wherefore, plaintiff prays judgment against the defendants for the possession of said parcels of mining claims above described; for costs and disbursements in this action incurred; for a reasonable attorney's fee; and for such other and further relief as to the Court shall seem meet.

/s/ J. L. McCARREY, JR.,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed January 29, 1953.

In the District Court for the District of Alaska, Third Division

No. A-8422

SUPERIOR SAND AND GRAVEL MINING CO., INC., a Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR.; LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Associated as the NORTHERN CONSTRUCTION ASSOCIATION, and ELLSWORTH E. SAXTON, as Agent for Said Association, ANCHORAGE SAND AND GRAVEL COMPANY, INC,. a Corporation, and the TERRITORY OF ALASKA,

Defendants.

COMPLAINT TO DETERMINE ADVERSE PLACER MINING CLAIMS

Comes now the plaintiff in the above-entitled action and complains of the defendants, and for cause of action alleges:

I.

That plaintiff is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, having its principal place of business at

Anchorage, Third Judicial Division, Territory of Alaska, and that it has paid its annual corporation tax last due and has filed its financial statement and annual report last due with the Auditor of the Territory of Alaska and the Clerk of the District Court for the Third Judicial Division, Territory of Alaska, respectively, and, at all times herein mentioned was and now is a citizen of the United States of America and the Territory of Alaska.

II.

That Anchorage Sand and Gravel Company, Inc., is a corporation duly organized and existing as such under the laws of the Territory of Alaska.

III.

That defendant, Territory of Alaska, is an organized Territory of the United States of America.

IV.

That on and prior to the 27th day of November, 1950, the property hereinafter described and known as Section 16 in Township 13 N, Range 3 W, Seward Meridian, in the Anchorage Mining District, Third Judicial Division, Territory of Alaska, was part of the vacant and unappropriated public land of the United States, free and open to exploration and purchase by the citizens thereof, for the valuable mineral deposits therein contained.

V.

That on said date, to wit: on the 27th day of November, 1950, plaintiff's grantors, Helen U. Wil-

cox, Lucy Cuddy, Howard G. Wilcox, Betty Cuddy, Warren N. Cuddy and Daniel H. Cuddy, being citizens of the United States, entered upon said ground, hereinafter particularly described and known as the Superior Gravel Fraction Placer Mining Claim, Discovery Sand and Gravel Association Placer Mining Claim and Number 2 Sand and Gravel Association Placer Mining Claim and segregated the same from the public domain by posting a notice of location thereon and by distinctly marking the boundaries thereof upon the ground so that the same could be readily traced; and did, to wit: on or about the 27th of November, 1950, make a discovery of sand and gravel and other valuable minerals and valuable mineral deposits within the exterior boundaries on said Superior Gravel Fraction Placer Mining Claim, Discovery Sand and Gravel Association Placer Mining Claim, and Number 2 Sand and Gravel Association Placer Mining Claim, and did thereafter, to wit: on the 21st of February, 1951, cause to be recorded in the office of the Commissioner, Anchorage Recording Precinct, Third Judicial Division, Territory of Alaska, which was and is the Recording Precinct within which said placer mining claim was and is situate, true copies of said notices of location of said placer mining claims, giving the names of the said locators, said plaintiff's grantors as the locators thereof, the date of said location, the name of the claims and such a description of such placer mining claim hereinbefore referred to, and hereinafter particularly described, with reference to natural objects and permanent

monuments so that the same could be readily identified. Said property so located as aforesaid, being described as follows:

Superior Gravel Fraction Placer Mining Claim, more fully described as follows:

> From a post situated at and identical with the North Quarter (N 1/4) Corner of Section 16, Township 13 North, Range 3 West, Seward Meridian, thence along an unimproved road approximately 1,320 feet (twenty chains) in an easterly direction along the North boundary of said Section 16 and Corner No. 2; thence in a southwesterly direction approximately 2,000 feet along the centerline of the Anchorage-Mountain View Road to the North-South Center Line of said Section 16 and Corner No. 3, which is monumented by Post No. 3, which is set approximately 66 feet (one chain) northerly approximately on the North-South center line of said Section 16, thence in a northerly direction along the North-South center line of Section 16, approximately 1485 feet (22.5 chains) to the place of beginning, and lies wholly within the Northeast one-quarter of said Section 16, containing 26 acres of land more or less.

Discovery Sand and Gravel Association Placer Mining Claim, more fully described as follows:

> From a post situated at and identical with the Northwest corner of Section 16, Township 13 North, Range 3 West, Seward Meridian, thence along a brushed line in an Easterly direction

along the north line of said Section 16 approximately 2640 feet (40 chains) to the North one-quarter (N 1/4) Corner of said Section 16 to Post No. 2, thence following a brushed line in a southerly direction along the North-South center line of said Section 16 approximately 1485 feet (22.5 chains) to the center line of the Anchorage-Mountain View Road to Corner No. 3, which post is placed approximately 66 feet (1 chain) Northerly and approximately on the North-South center line of said Section 16 and is a witness corner, thence Westerly approximately 3000 feet along the center line of the Anchorage-Mountain View Road to the West side line of said Section 16 to Corner No. 4 which is monumented by a witness corner approximately 66 feet (1 chain) North of the true corner and Post No. 4, thence in a Northerly direction along the West side line of said Section 16 approximately 2072 feet (31.4 chains) to the place of beginning and is wholly within the Northwest one-quarter of Section 16, containing 135 acres of land more or less.

Number 2 Sand and Gravel Association Placer Mining Claim, more fully described as follows:

From a post which is situated at and identical to the Northeast corner of Section 16, Township 13 North, Range 3 West, Seward Meridian, thence approximately 2640 feet (40 chains) along a road in a Southerly direction along the

East side line of said Section 16 to the East one-quarter (E 1/4) corner and Corner No. 2, which is witnessed by a post set approximately 66 feet (1 chain) Westerly from said Corner No. 2; thence along a brushed line approximately 2640 feet (40 chains) in a Westerly direction along the East-West center line of said Section 16 to the center of said Section and Corner No. 3, thence approximately 1155 feet (17.5 chains) in a Northerly direction along the North-South center line of said Section 16 to the center line of the Anchorage-Mountain View Road and Corner No. 4, which is witnessed by Post No. 4 which is set approximately 66 feet (1 chain) Southerly of the true corner approximately on the North-South center line of said Section 16; thence in a Northeasterly direction approximately 2000 feet along the center line of said Anchorage-Mountain View Road to the point at which said road turns to follow the North side line of said Section 16 being Corner No. 5 which is witnessed by a post set approximately 66 feet (1 chain) southerly of corner No. 5; thence Easterly approximately 1320 feet along the center line of said Mountain View Road to the point of beginning, and lies wholly within the Northeast one-quarter of said Section 16, containing 134 acres of land more or less.

VI.

Plaintiff further alleges that said plaintiff and its said grantors ever since said date of the location of said placer mining claim have been and now are

the owners of said placer mining claims and locations, premises and property and the whole thereof, as to all persons, save and except the United States of America; are in possession and entitled to the possession of every part of the same. That said plaintiff and its grantors have complied with every rule, regulation and custom in force in said Anchorage Mining District, and with the provisions of the mining laws of the Territory of Alaska and the Acts of Congress in that behalf enacted; and the defendants herein have no right, title, or estate whatsoever in or to said placer mining claim or location, or in or to any part, portion or parcel thereof.

VII.

Plaintiff further alleges that defendants herein assert that they are and pretend to be the owners of all of said Section 16 in Township 13 North, Range 3 West, Seward Meridian, hereinbefore described, under and by virtue of placer mining locations pretendedly made by it or those under whom it claims, prior to the title of plaintiff, or its grantors, but which said pretended placer mining locations, and each thereof, so claimed by the defendants herein, or those under whom it claims were pretendedly made by defendants at the time when the said Section 16 and the whole thereof had passed into private ownership, and the same and no part thereof was vacant or unappropriated public land or free or open to exploration, or location, or purchase as part of the public domain, under the mining law of the United States, or otherwise.

VIII.

That the claims of the defendants herein are all, and each of them is, inferior and subordinate to the title of plaintiff and its said grantors, which title, last aforesaid, arises by virtue of the valid location so made by said plaintiff's grantors, as hereinbefore set forth, and defendants' claims and titles cast a cloud upon the possession and title of plaintiff and prevent it from enjoying fully and peaceably the fruits of its said ownership.

IX.

Plaintiff further alleges that the defendants herein, in pursuance of such conspiracy and to fully consummate the same, and wrongfully claiming to be the owner of said alleged and pretended placer mining claims, did heretofore, to wit: on or about the 24th day of September, 1952, file or cause to be filed in the United States Land Office at Anchorage, Alaska, in the Territory of Alaska, its application for a patent from the government of the United States of America, for said alleged and pretended Northern Construction Association Claim No. 3 and Northern Construction Association Claim No. 4, and for the whole thereof, and therein described as embracing all the North one-half of Section 16, in Township 13 North, Range 3 West, Seward Meridian, containing about 320 acres of land.

X.

That in and by said application for patent, defendants herein wrongfully, falsely and fraudulently

set up, alleged and claimed that they, said defendants, were and are the owners and in possession and entitled to the possession of the whole of the said alleged Northern Construction Association Claim No. 3 and Northern Construction Association Claim No. 4, embracing all of said North one-half of said Section 16, and the said placer mining claims and locations of plaintiff and its grantors.

XI.

That defendant, Territory of Alaska, claims an interest in the above-described property adverse to the claims of plaintiff.

XII.

That the said defendants have at all times since maintained and prosecuted and now do maintain and prosecute their said false, fraudulent and wrongful application for said patent, and thereby the title of the plaintiff in and to said placer mining claim and location hereinbefore mentioned, as duly located by plaintiff's grantors is impeached, clouded and encumbered, and the value of the estate and property of the plaintiff therein is greatly depreciated to the great and irreparable damage of the plaintiff.

XIII.

Plaintiff further alleges that heretofore, to wit: on the 12th day of December, 1952, and within the sixty-day period of newspaper publication of the said defendants' notice of application for patent, plaintiff filed its adverse claim against the issuance

of such patent to the said defendants for their said alleged and pretended Northern Construction Association Claim No. 3, and Northern Construction Association Claim No. 4, said adverse claim showing the nature, boundaries and extent of said adverse claim; and plaintiff brings this suit within sixty (60) days after the filing thereof, for the purpose of determining said adverse claim and the right of possession to the said placer mining claims so located as aforesaid by said plaintiff's grantors.

Wherefore, the plaintiff prays the judgment of this court that said defendants, Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton and Grace D. Saxton associated as the Northern Construction Association and Ellsworth E. Saxton as agent for said association, have no estate, interest, possession or right of possession in or to said alleged North one-half of said Section 16 in Township 13 North, Range 3 West, Seward Meridian, and the said placer mining claims and locations hereinbefore and in paragraph V hereof, particularly described as the property and estate of the plaintiff and the said mineral substances in said North one-half of said Section 16, contained, or either or any of them; and that the plaintiff be deemed to be the owner, and subject to the paramount title of the United States of America and lawfully in and entitled to the possession of the placer mining claims and locations in said Paragraph V particularly mentioned and described and of each and every the mineral deposits and mineral

substances therein contained and that the plaintiff's title thereto and to each and all thereof and to the possession thereof be quieted and confirmed as against said defendants and all persons claiming by through, or under it; and that said defendants have not and never have had any estate, possession, right of possession, title or interest whatsoever of, in or to said North one-half of said Section 16 in Township 13 North, Range 3 West, Seward Meridian, or any part or portion thereof, and that said defendants be forever barred from asserting or claiming any estate, right, interest, or right of possession therein, or to any part or parcel thereof, or to any mining claim or location therein; and that the plaintiff may have such other and further relief as the nature of its case may require and as shall seem meet.

/s/ JOHN E. MANDERS,
Attorney for Plaintiff.

[Endorsed]: Filed February 9, 1953.

[Title of District Court and Cause.]

No. A-8422

DISCLAIMER

Comes now one of the above-named defendants, Anchorage Sand and Gravel Company, Inc., and for itself only, answers the complaint on file herein as follows:

I.

The said defendant disclaims all right, title or interest of whatsoever character or extent, in or to any or all of the premises described in the plaintiff's complaint on file, embracing all of the North one-half of Section 16, Township 13 North, Range 3 West, Seward Meridian.

Wherefore, defendant, Anchorage Sand and Gravel Company, Inc., prays judgment against the plaintiff for its costs in this action.

/s/ J. L. McCARREY, JR.,

Attorney for Defendant, Anchorage Sand and Gravel Company, Inc.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1953.

In the District Court for the Territory of Alaska, Third Division

No. A-8423

SUPERIOR SAND AND GRAVEL MINING CO., INC., a Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, et al.,

Defendants.

ANSWER AND CROSS-COMPLAINT

Comes now one of the above-named defendants, Anchorage Sand and Gravel Company, Inc., and for itself only, and not for its co-defendants, answers the complaint of the plaintiff on file herein as follows:

I.

Answering Paragraph I, defendant admits that plaintiff is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, but has neither information nor belief as to the remainder of said paragraph, and therefore neither admits nor denies the same.

II.

Defendant admits the allegations contained in paragraphs II, III and IV.

III.

Answering Paragraph V, defendant admits that notices of location were posted upon said ground and

that a copy of said notice was recorded in the office of the Commissioner, Anchorage Recording Precinct, Third Judicial Division, Territory of Alaska, and denies each and every other material allegation contained in said paragraph.

IV.

Answering Paragraph VI, defendant denies each and every allegation therein contained insofar as they pertain to the claims of the defendant as more fully set forth in Cause No. A-8385, Anchorage Sand and Gravel Company, Inc., an Alaskan corporation, vs. Vernon C. Schubert, et al.

V.

Answering Paragraph VII, defendant admits that it claims a portion of Section 16 in Township 13 North, Range 3 West, Seward Meridian, Territory of Alaska, and denies each and every other material allegation therein contained.

VI.

Answering Paragraph VIII, defendant denies each and every allegation therein contained, insofar as they pertain to the claims of the defendant.

VII.

Answering Paragraphs IX and X, defendant believes the allegations therein contained to be true as to all defendants save and except this defendant and the Territory of Alaska.

VIII.

Answering Paragraph XI, defendant believes the allegations therein contained to be true.

IX.

Answering Paragraph XII, defendant is informed and therefore believes that the defendants known as Northern Construction Association are maintaining and prosecuting their application for patent to said premises, but denies that said placer mining claim and location was duly located by plaintiff's grantors, or that plaintiff has any title to be impeached, clouded and encumbered so far as the claims of this defendant are concerned.

X.

Answering Paragraph XIII, defendant admits the allegations therein contained.

Cross-Complaint

Comes now one of the above-named defendants, Anchorage Sand and Gravel Company, Inc., and by way of Cross-Complaint against the plaintiff, alleges and complains as follows:

I.

Defendant does hereby adopt each and every allegation contained in its Complaint filed in Cause No. A-8385, In the District Court for the Territory of Alaska, Third Division, entitled "Anchorage Sand and Gravel Company, Inc., an Alaskan corporation, vs. Vernon C. Schubert, Dorothy Schu-

bert, Clarence D. Smith, Jr.; William E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton, and Grace D. Saxton, co-partners doing business as Northern Construction Association; Superior Sand and Gravel Mining Co., Inc., and the Territory of Alaska," and incorporates the same herein as though said Complaint were set forth in full.

Wherefore, defendant, Anchorage Sand and Gravel Company, Inc., prays that the plaintiff take nothing as against this defendant, and that the relief prayed in the Complaint in Cause No. A-8385 be granted.

/s/ J. L. McCARREY, JR.,
Attorney for Anchorage Sand
and Gravel Company, Inc.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1953.

In the District Court for the Territory of Alaska, Third Division

No. A-8422

SUPERIOR SAND AND GRAVEL MINING CO., INC., a Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR.; LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON AND GRACE D. SAXTON, Associated as the NORTHERN CONSTRUCTION ASSOCIATION, and ELLSWORTH E. SAXTON, as Agent for Said Association; ANCHORAGE SAND AND GRAVEL COMPANY, INC., a Corporation, and the TERRITORY OF ALASKA,

Defendants.

ANSWER

Come now the defendants, Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton and Grace D. Saxton, associated as the Northern Construction Association, and Ellsworth E. Saxton, as agent for said association, individually, and for answer to plaintiff's complaint, admit, deny and allege as follows:

I.

These defendants deny the allegations contained in paragraph I of plaintiff's complaint.

II.

These defendants admit the allegations of paragraph II of said complaint.

III.

These defendants admit the allegations contained in paragraph III of said complaint.

IV.

These defendants admit the allegations of paragraph IV of said complaint.

V.

These defendants deny each and all of the allegations contained in paragraph V of said complaint.

VI.

These defendants deny each and all of the allegations contained in paragraph VI of said complaint.

VII.

These defendants, for the reason that they have located and filed valid claims upon said lands, claim ownership of the lands embraced within the purported claims of the plaintiff, but deny each and all of the other allegations contained in paragraph VII of said complaint.

VIII.

These defendants deny all allegations contained in paragraph VIII of said complaint.

IX.

These defendants admit that they have filed in the Regional Office, Bureau of Land Management, Department of Interior at Anchorage, Alaska, an application for patent for the North One-Half (N ½) of Section Sixteen (16), Township Thirteen (13) North, Range Three (3) West, Seward Meridian, but these defendants deny that said filing is either conspiratorial or wrongful, and allege that the claim of these defendants to said lands is valid and superior to the purported claim of the plaintiff.

X.

These defendants deny the allegations contained in paragraph X of said complaint.

XI.

These defendants deny the allegations of paragraph XI of plaintiff's complaint.

XII.

These defendants deny the allegations contained in paragraph XII of said complaint.

XIII.

These defendants admit that plaintiff filed an adverse claim, but deny that said adverse filing was either timely or valid.

Wherefore, having fully answered, these defendants and each of them pray that the complaint of the plaintiff be dismissed and that the plaintiff take nothing by reason thereof, and that these defend-

ants, and each of them, have and recover their costs and attorneys' fees herein incurred.

PLUMMER & ARNELL,

By /s/ E. L. ARNELL,

Attorneys for Northern Construction Association and Ellsworth E. Saxton, Agent.

Service of copy acknowledged.

[Endorsed]: Filed April 13, 1953.

[Title of District Court and Cause.]

Nos. A-8385, A-8422 and A-8423

MOTION FOR CONSOLIDATION OF ABOVE ACTIONS

Defendant Territory of Alaska moves the court, pursuant to Rule 42 (a) of the Federal Rules of Civil Procedure, for an order consolidating the above-entitled actions now pending in this court into one action, on the ground that they involve common questions of both law and facts and that consolidation will avoid unnecessary costs and delay. In support of this motion, defendant submits the affidavit of Thomas B. Stewart, attorney for the Territory of Alaska, attached hereto.

/s/ THOMAS B. STEWART,
Assistant Attorney General,
Territory of Alaska.

Dated April 28, 1953.

Thomas B. Stewart, being duly sworn, deposes and says:

1. He is one of the attorneys for the defendant, the Territory of Alaska, in each of the above-entitled causes.

2. These actions were brought respectively on the 29th day of January, 1953, the 9th day of February, 1953, and the 9th day of February, 1953, and each of these actions is now pending in this Court.

3. The issues in all of said actions arise out of conflicting claims to rights in the same real property, being Section 16 of T. 13 North, R. 3 West, of the Seward Meridian, and are based upon related facts. All of the actions involved common questions of law and facts.

4. Considerable time and expense will be saved by the consolidation of the three actions.

/s/ THOMAS B. STEWART,
Assistant Attorney General,
Territory of Alaska.

Subscribed and Sworn to before me this 28th day of April, 1953, at Anchorage, Alaska.

[Seal] ROSE WALSH,
U. S. Commissioner.

Service of copy acknowledged.

[Endorsed]: Filed April 28, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS UNDER RULE 12 (b) (6) FRCP

The defendant, the Territory of Alaska, moves to dismiss the complaint filed by the plaintiff because it fails to state a claim upon which relief can be granted, and in support thereof assigns the following reasons:

1. The discovery of sand and gravel is not, and was not at the time of making the alleged mineral discoveries, a legal basis sufficient to support the location of mineral claims on the lands involved herein under the laws of the United States.

2. Ordinary sand and gravel are not "minerals" within the meaning of that term as used in the general mining laws of the United States.

3. The land embraced within the placer mining claims alleged in the complaint was not at the time of their location available to such location because of prior appropriation and use of the land by the United States of America and the Territory of Alaska for purposes of support of the common schools of Alaska and for other purposes.

4. Public lands of United States, reserved by Act of Congress from sale or settlement for the support of the common schools of Alaska, are not subject to placer mining locations for sand and gravel.

5. And for other reasons to be assigned at the hearing of this motion.

/s/ THOMAS B. STEWART,
Assistant Attorney General,
Territory of Alaska.

Service of copy acknowledged.

[Endorsed]: Filed April 28, 1953.

[Title of District Court and Cause.]

Nos. 8385, 8422, 8423

ORDER FOR CONSOLIDATION OF ACTIONS

The above-entitled actions came on for hearing on the motion of defendant, the Territory of Alaska, therein, supported by the affidavit of Thomas B. Stewart, attached thereto, and it appearing to the court that all of said actions involve common questions of law and fact, it is

Ordered, that the above-entitled actions be and they are hereby consolidated into one action in this court, and that the orders and proceedings heretofore had in said actions, respectively, are hereby made orders and proceedings in this action;

Ordered, the consolidated action shall proceed under the title of "Anchorage Sand and Gravel Company, Inc., an Alaskan Corporation, Plaintiff, vs. Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton,

and Grace D. Saxton, co-partners doing business as Northern Construction Association; Superior Sand and Gravel Mining Co., Inc., and the Territory of Alaska, Defendants; and Superior Sand and Gravel Mining Co., Inc., a corporation, Plaintiff, vs. Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton, and Grace D. Saxton, associated as the Northern Construction Association, and Ellsworth E. Saxton, as agent for said association, Anchorage Sand and Gravel Company, Inc., a corporation, and the Territory of Alaska, Defendants, No. 8385, Consolidated Action";

And Ordered, that the clerk of this court be, and he is hereby directed and authorized to consolidate the files of said three actions above-entitled, under the file number of the action as herein ordered entitled.

This Order is made without prejudice to future motion by any of parties for separate trial of any of consolidated action.

Dated at Anchorage, Alaska, this 8th day of May, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed and entered May 8, 1953.

[Title of District Court and Cause.]

OPINION

Filed September 8, 1953

The foregoing actions were brought under the provisions of 30 U.S.C.A. 30, to determine the right of possession under the mining laws of the United States to a part of the public lands reserved to the Territory of Alaska for school purposes by the Act of March 4, 1915, 38 Stat. 1214, 48 U.S.C.A. 353. Since the consolidation of these actions, the defendant, Territory of Alaska, has moved to dismiss on the following grounds that:

(1) The discovery of sand and gravel is not, and was not at the time of making the alleged mineral discoveries, a legal basis sufficient to support the location of mineral claims on the lands involved herein under the laws of the United States.

(2) Ordinary sand and gravel are not "minerals" within the meaning of that term as used in the general mining laws of the United States.

(3) The land embraced within the placer mining claims alleged in the complaint was not at the time of their location available to such location because of prior appropriation and use of the land by the United States of America and the Territory of Alaska for purposes of support of the common schools of Alaska and for other purposes.

(4) Public lands of United States, reserved by Act of Congress from sale or settlement for the

support of the common schools of Alaska, are not subject to placer mining locations for sand and gravel.

The land involved is adjacent to the City of Anchorage and like that upon which the City is built, consists almost exclusively of gravel, which is valuable not only because of its proximity to the City but also because of construction activities.

To permit of the disposal of timber and the extraction of minerals from school lands under the mining and mineral leasing laws of the United States, the Act of March 7, 1939, 53 Stat. 1243 was passed. This legislation was implemented by Chapter 101 SLA 1933, Sections 47-2-78, et seq., ACLA 1949, empowering the Governor to lease these lands.

By October, 1950, the land here involved had been leased, and gravel was being removed from a portion of it, by the Anchorage Sand & Gravel Co., Inc., under a contract entered into with the Department of the Interior, pursuant to the authority conferred upon that Department by the Act of July 31, 1947, 61 Stat. 681, 43 U.S.C.A. 1185, 1187 commonly referred to as the "Materials Act." Manifestly, the removal of gravel would gut the land and render it worthless.

In November and December, 1950, the Anchorage Sand & Gravel Co., Inc., the Superior Sand & Gravel Mining Co., Inc., and the Northern Construction Association, parties to the actions now consolidated, also made locations of placer claims on the

[Title of District Court and Cause.]

OPINION

Filed September 8, 1953

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(2) Ordinary sand and gravel are not "minerals" within the meaning of that term as used in the general mining laws of the United States.

(3) The land embraced within the placer mining claims alleged in the complaint was not at the time of their location available to such location because of prior appropriation and use of the land by the United States of America and the Territory of Alaska for purposes of support of the common schools of Alaska and for other purposes.

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In November and December, 1950, the Anchorage Sand & Gravel Co., Inc., the Superior Sand & Gravel Mining Co., Inc., and the Northern Construction Association, parties to the actions now consolidated, also made locations of placer claims on the

land under claims of discovery of sand and gravel. When the Northern Construction Association applied for a patent, the other claimants and the Territory of Alaska filed adverse proceedings in the land office and, in support thereof, the instant actions were instituted in this Court in which the Territory of Alaska was named as defendant.

Two questions are presented:

(1) Whether gravel is a "valuable mineral deposit" under the mining laws of the United States and, if so,

(2) Whether school lands in Alaska are open to location under the mining laws.

So far as the first question is concerned, the problem appears to be primarily one of ascertaining Congressional intent rather than of etymology. Section 22 of Title 30 U.S.C.A. provides that:

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

The state of the precedents is such that the ques-

tion may be regarded as an open one, to be resolved upon a consideration of factors bearing on intent in the light of history and such authorities as are available.

It is undisputed that the entire area involved, as well as contiguous areas, consists of sand and gravel possessing no particular property or characteristic which would enhance their value above that which is attributable to proximity of the land to Anchorage and the scene of construction activities.

Within a year after the enactment of the mining law of 1872, the view of the Land Department as to the meaning of the word "mineral" was set forth in a circular of instructions as follows: 1 Lindley on Mines, 163, 3rd ed.:

In the sense in which the term "mineral" was used by Congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included. * * * From a careful examination of the matter, the conclusion I reach as to what constitutes a valuable mineral deposit is this: That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantities and quality to render the land sought to be patented more valuable on this account than for the purpose of agriculture, should be treated by the office as coming within the purview of the Mining Act of May 10, 1872.

This view was followed in Zimmerman vs. Brunson (1910), 39 L.D. 310. A like conclusion was

reached in a well reasoned opinion in United States vs. Aitken (1913), 25 Phil. 7. However, Loney vs. Scott (1910), 112 Pac. 172, to the contrary, appears to extend the meaning of "mineral" to anything of value extracted from the land. Aside from the fact that this would seem to be a rather dubious test, it may perhaps be accounted for by the fact that that Court at page 175 mistook a statement of the theory of one of the parties in Northern Pacific Ry. vs. Soderberg at 188 U.S. 534, for the opinion of the Supreme Court. Perhaps influence by Loney vs. Scott, the Land Department in Layman vs. Ellis (1929) 52 L.D. 714, overruled the Zimmerman case and adhered to that decision in 54 L.D. 294 and United States vs. Barngrover (1942), 57 L.D. 533.

It is difficult for me to avoid the conclusion that in these cases undue weight was given to the value of gravel, as reported by the United States Geological Survey, and that the rule there enunciated may be attributed to a shift of emphasis from composition of the substance alleged to be mineral to value. I am inclined, therefore, to reject this criterion and to concur in the view that sand and gravel are not minerals, particularly where the location is made on land consisting almost exclusively of gravel, not only for the reasons stated by the authorities cited, but also because effect must be given to the implications of the word "discovery" in 30 U.S.C.A. 23 and the clause "and the lands in which they (mineral deposits) are found" in Section 22 of that title. Congress must have had in mind minerals which ex-

ist separately and differ from the surrounding matter in which they are found and from which they may be taken only by extraction and mining, United States vs. Iron Silver Mining Co., 128 U.S. 673, 679; Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 58 Atl. 486, 487. Undoubtedly in requiring a discovery of mineral as a prerequisite to the appropriation of the land in which it is found, Congress intended to limit such appropriation and yet stimulate prospecting by rewarding the prospector who found a valuable mineral. In the traditional sense, it is difficult to conceive of a discovery not attendant with great hardship, effort and expense. 2 Lindley on Mines, Section 437, 3rd ed. To say that a discovery of gravel may be made in a large area of gravel open to view is to say that there can be a discovery of water in Cook Inlet or snow on Mt. McKinley. Such a perversion of the term would not only obliterate the safeguard referred to and result in the appropriation of large areas of the public domain to the detriment of the public, but it would also ignore the clause "and the lands in which they are found" in Section 23, of Title 30. It is inconceivable that this was within the contemplation of Congress. Further support for this view may be found in the fact that by the Act of July 31, 1947, 61 Stat. 681, 43 U.S.C.A. 1185, et seq., Congress authorized the disposition of sand, gravel, stone and clay from the public land. Since this act bears a close analogy to the mineral lands leasing act, it would appear to follow that sand and gravel, like the minerals specified in

the latter act, were not intended to be disposed of under the mining laws, Cf. Matter of Van Dolah A-26443, decided Oct. 14, 1952, by the Interior Department, Dunbar Lime Co. vs. Utah-Idaho Sugar Co., 17 Fed. (2) 351, 355-6, Holman vs. State, 41 L.D. 314.

The questions argued on behalf of Northern Construction Association and the Superior Sand and Gravel Mining Co., Inc., in opposition to the motion to dismiss, are either not presented by the record or are not involved and, hence, do not merit extended discussion.

I am of the opinion, therefore, that the motion should be granted.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed September 9, 1953.

In the District Court for the Territory of Alaska,
Third Division

No. A-8385 Consolidated Action
(Formerly A-8422 and A-8423)

ANCHORAGE SAND AND GRAVEL COMPANY, INC., an Alaskan Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Co-Partners Doing Business as NORTHERN CONSTRUCTION ASSOCIATION, SUPERIOR SAND AND GRAVEL MINING CO., INC., and the TERRITORY OF ALASKA,

Defendants,

and

SUPERIOR SAND AND GRAVEL MINING CO., INC., a Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON, and GRACE D. SAXTON, Associated as the NORTHERN CONSTRUCTION ASSOCIATION, and ELLSWORTH E.

SAXTON, as Agent for Said Association; ANCHORAGE SAND AND GRAVEL COMPANY, INC., a Corporation, and the TERRITORY OF ALASKA,

Defendants.

ORDER

This cause came on to be heard on motion of the defendant, the Territory of Alaska, to dismiss the complaints in the above-entitled consolidated causes, on the ground the mining claims, which are the subject matter of the said causes, are null and void, and that therefore the said complaints fail to state a claim upon which relief can be granted, for the reasons set forth in an opinion of this Court filed herein on the 8th day of September, 1953, it is

Ordered, Adjudged, and Decreed, that the complaints herein be dismissed with prejudice.

Dated: September 15, 1953.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed and entered September 15, 1953.

[Title of District Court and Cause.]

Nos. 8385, 8422, 8423

NOTICE OF APPEAL

Notice is hereby given that Superior Sand and Gravel Mining Co., Inc., a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain order or judgment entered in the above-entitled cause by the above-entitled Court on the 15th day of September, 1953, in favor of defendant Territory of Alaska and against said plaintiff, wherein it was determined that the mining claims, the subject matter of said complaints, were null and void, that said complaints failed to state a claim on which relief could be granted for the reason set forth in an opinion of the Court filed in said action on the 8th day of September, 1953, and further ordering that the complaints of plaintiff be dismissed with prejudice, all as will more fully appear from said order or judgment.

Dated at Anchorage, Alaska, this 14th day of October, 1953.

/s/ JOHN E. MANDERS,
Attorney for Appellant, Superior Sand and Gravel Mining Co., Inc., a Corporation.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

Nos. A-8385, A-8422 and A-8423

STATEMENT OF POINTS ON APPEAL

Plaintiff-Appellant Superior Sand and Gravel Mining Co., Inc., herewith presents the points upon which it claims the Court erred:

1. In holding and deciding that the mining claims, which are the subject matter of said causes, are null and void.

2. In holding and deciding that sand and gravel are not minerals.

3. In holding and deciding that sand and gravel are not subject to location and disposition under the mining laws of the United States.

4. In holding and deciding that school lands for the support of the common schools of Alaska are not subject to placer mining locations for sand and gravel.

5. In allowing the motions of defendant Territory of Alaska, dismissing the Complaints in the above-entitled actions.

6. In dismissing the Complaints in the above-entitled actions.

7. In entering judgment that plaintiffs take nothing by their Complaints.

/s/ JOHN E. MANDERS,

Attorney for Plaintiff and Appellant, Superior Sand and Gravel Mining Co., Inc., a Corporation.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

Nos. A-8385, A-8422 and A-8423

COST BOND

Know All Men by These Presents: That we, Superior Sand and Gravel Mining Co., Inc., a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact surety business in the Territory of Alaska, as surety, are held and firmly bound unto Territory of Alaska, defendant in the above-entitled consolidated actions, in the penal sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Territory of Alaska, said defendant, for which payment well and truly to be made, we bind ourselves, our successors or assigns, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of October, 1953.

The condition of the above obligation is such that whereas, the said Superior Sand and Gravel Mining Co., Inc., is about to take an appeal to the United States Court of Appeals for the Ninth Circuit to reverse a judgment of dismissal made, rendered and entered on the 15th day of September, 1953, by the District Court for the District of Alaska, Third Division, in the above-entitled consolidated actions.

Now, Therefore, the condition of the above obligation is such that if Superior Sand and Gravel Mining Co., Inc., shall prosecute its said appeal to effect and answer all costs which may be adjudged against it if it fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

SUPERIOR SAND AND
GRAVEL MINING CO., INC.,

By /s/ JOHN E. MANDERS,
Its Attorney,
Principal.

UNITED STATES FIDELITY
& GUARANTY COMPANY,

By /s/ GRACE M. McCONNELL,
Attorney-in-Fact,
Surety.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

No. A-8385—Consolidated Action
(Formerly A-8422 and A-8423)

NOTICE OF APPEAL

Come now the defendants, Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton and Grace D. Saxton, co-part-

ners doing business as the Northern Construction Association, and Ellsworth E. Saxton, as agent for said Association, and give notice that they hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final order of dismissal entered in this action on the 15th day of September, 1953.

/s/ E. L. ARNELL,

Attorney for Northern Construction Association and Ellsworth E. Saxton, Agent, Defendants-Appellant.

Service of copy acknowledged.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

Nos. A-8385, A-8422 and A-8423

COST BOND

Know All Men by These Presents: That we, Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton and Grace D. Saxton, associated as the Northern Construction Association, and Ellsworth E. Saxton, as agent for such association, as principals, and United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact surety business in the Territory of Alaska, as surety, are held and firmly

bound unto the Territory of Alaska, defendant in the above-entitled consolidated actions, in the penal sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Territory of Alaska, said defendant, for which payment well and truly to be made, we bind ourselves, our successors or assigns, jointly and severally by these presents.

Sealed with our seals and dated this 31st day of October, 1953.

The condition of the above obligation is such that whereas, the said Northern Construction Association and Ellsworth E. Saxton, Agent, are about to take an appeal to the United States Court of Appeals for the Ninth Circuit to reverse a judgment of dismissal made, rendered and entered on the 15th day of September, 1953, by the District Court for the District of Alaska, Third Division, in the above-entitled consolidated actions.

Now, Therefore, the condition of the above obligation is such that if Northern Construction Association and Ellsworth E. Saxton, Agent, shall prosecute their said appeal to effect and answer all costs which may be adjudged against it if it fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN CONSTRUCTION ASSOCIATION,

By /s/ ELLSWORTH E. SAXTON,
Agent,
Principal.

UNITED STATES FIDELITY
& GUARANTY COMPANY,

By /s/ GRACE M. McCONNELL,
Attorney-in-Fact,
Surety.

Affidavit of mailing attached.

[Endorsed]: Filed November 5, 1953.

[Title of District Court and Cause.]

Nos. A-8385, A-8422 and A-8423

STATEMENT OF POINTS ON APPEAL

Defendant-Appellant, Northern Construction Association, and defendant-appellant, Ellsworth E. Saxton, Agent, herewith present the points upon which they claim the Court erred:

1. In holding and deciding that the mining claims, which are the subject matter of said causes, are null and void.

2. In holding and deciding that sand and gravel are not minerals.

3. In holding and deciding that sand and gravel are not subject to location and disposition under the mining laws of the United States.

4. In holding and deciding that school lands for the support of the common schools of Alaska are not subject to placer mining locations for sand and gravel.

5. In allowing the motions of defendant, Territory of Alaska, dismissing the complaints in the above-entitled actions.

6. In dismissing the complaints in the above-entitled actions.

/s/ E. L. ARNELL,
Attorney for Defendant and Appellant, Northern Construction Association, and for Defendant and Appellant, Ellsworth E. Saxton, Agent.

Service of copy acknowledged.

[Endorsed]: Filed November 5, 1953.

[Title of District Court and Cause.]

Consolidated A-8385, A-8422 and A-8423

Before: The Honorable George W. Folta,
U. S. District Judge.

June 19, 1953—1:30 o'Clock P.M.

TRANSCRIPT OF RECORD ON APPEAL OF EXCERPTS OF PROCEEDINGS ON MOTION TO DISMISS

Appearances:

J. L. McCARREY, JR.,
JULIANA D. WILSON,
Attorneys for Plaintiff, Anchorage Sand and Gravel Company, Inc., an Alaskan Corporation.

JOHN E. MANDERS,

For Plaintiff, Superior Sand and Gravel Mining Co., Inc., a Corporation.

J. GERALD WILLIAMS,

THOMAS B. STEWART,

For the Territory of Alaska.

EDWARD L. ARNELL,

For Defendant, Northern Construction Association, and Defendant, Ellsworth E. Saxton, Agent.

Mr. Stewart: If it please the Court, the second principal ground for dismissing the action in this case is, the Territory argues, that the land embraced within the placer mining claims alleged in the complaint was, at the time of the location, not available to such location because of prior use, and was for the use of the Territory of Alaska for the purposes of support of the common schools of Alaska and for other purposes.

* * *

Mr. Stewart: I have now stated the position of the Territory as to the law. In order to illustrate the uses being made to show that there were uses which would be inconsistent with the mining of gravel, it is necessary to make a statement as to which uses were being made. This is a matter which is outside the pleadings and it is a matter which might properly be alleged by affidavit. It would convert this portion of the motion, which we feel

should be distinguished from the prior portion which I argued, making this portion of the motion only into a motion for summary judgment, and I have to make a statement of facts in order to permit the Court to have it before it, if he cares to, as to what the uses were. I should like to make that statement a pure statement of the facts subject to objection by counsel for opposing sides to its being stated. You are familiar with the statement (speaking to counsel). The parties considered a stipulation on [3*] the matter, and I will state it, and I will illustrate it on the map, unless opposing counsel wishes at this time to object to it.

The Court: The objection would more properly be directed to the Court's consideration of it rather than your statement of it. I don't know what they could object unless you state it. There could be no harm to the parties in a mere statement of it. It is in the Court's considering it that might be prejudicial, as the objection will be directed to that——

Mr. Manders: That is the objection we have.

The Court (Continuing): Rather than your statement of it. Do you mean that——

Mr. Manders: I don't think it is material, your Honor.

The Court: But in order to have the record straight have to have the statement from him and make the objection.

Mr. Manders: That is true. We are dealing here with a motion to dismiss—not dealing with pleadings.

The Court: That alone wouldn't preclude the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Court's converting perhaps the motion into one for summary judgment, so long as it appeared that there was no issue of fact. Now I don't know. I've always required the party moving for the summary judgment to point out why there is no issue of fact, and if it became eliminated along the line, to point out the method by which it became eliminated.

Mr. Arnell: Upon the theory of the case Mr. Stewart presented there would be an issue of fact. Now he attempts to revert here to what I think are strictly equitable grounds [4] consistent with the opinion which Judge Dimond rendered sometime ago in another case. Now, in so doing I have no objection to his making a statement so long as it is understood that we have the right later to object and also make a similar statement or in the alternative produce evidence or file affidavits to controvert what Mr. Stewart says because when he makes a reference to use, of necessity somewhere along the line he is going to have to limit that statement to one that is very restricted, and likewise I would object upon the further ground that the actual lessees, the ones in possession, would be deprived, assuming that it is material, are the proper parties to raise the objection. My basis for that I will bring out in later argument on some other cases to the Court which show the nature of the Territory's interest in these lands that has been litigated in a number of jurisdictions.

Mr. Stewart: May it please the Court, I think that counsel has certainly a perfect right to object and to object to the position of the Territory before

the Court, but for the purpose of this argument only, that is whether or not there was a prior appropriation such as to prevent mineral entry, the statement need be merely of the facts of the use and limited to the specific area on the ground to which the use is being made. The Territory does not intend that the particular area is extended over the entire boundaries of the section, and I don't believe that the fact they are is open to very much question, and with leave of the Court, I [5] would proceed to state them on the basis the Court suggested. If they be objected to, if there is some controversy as to the truth of the facts stated, on the other hand if the opposing parties object to the statement of facts at this time, the Territory is quite willing to leave this portion of the argument at this time and have it considered at a later date with facts submitted on the basis of affidavit with an opportunity to the other parties to submit opposing affidavits if they think a controversial fact is alleged.

The Court: I don't see how I can pass on the situation as you described it because without making a statement to what you refer, then the objection would be one of mere procedure and not to the statement itself. It seems to me that you have to make a statement.

Mr. Stewart: In that case, your Honor, I will proceed with the statement, except for one other word about the meaning of the law at the time it stands.

* * *

Mr. Stewart: We proceed then to the statement of facts. I would like to make an illustration of it.

At the time of the staking of the claims in 1950 the entire tract was under lease from the Territory of Alaska to four parties. The portion of 80 acres to Mr. E. G. Bailey; (indicating) this portion outlined in green to A. T. Martin and the entire south half of the area to City of Anchorage and this little parcel to Pacific Airmotive and [6] in 1950 this lease was assigned to Reeve Airmotive. In addition, the Territory had granted a permit to the Alaska Road Commission to remove gravel from the section just shown there. The Bureau of Land Management under the Materials Act, April 10, 1950, permitted the Anchorage Sand and Gravel Company, one of the parties to this action, to purchase gravel from the area outlined here and it was also with the permission of the City, the lessee. In addition to those instruments illustrating the lease by the Territory and the disposition of the land by the Federal Government, uses of the land were being made and were restricted to these areas. Approximately 60 acres here was cleared for agricultural purposes and the soil turned and prepared for planting by the Martin Estate, Mr. Martin, who is since deceased, and approximately the area outlined there has been assigned by the Martin Estate to the military department of the Territory of Alaska and there had been erected on there at the time these locations were made a building, the warehouse building to house the materials and supplies of the National Guard. In this portion of the land Mr. E. G. Bailey had built a restaurant in that corner outlined by that green line there and in an area of ap-

proximately two and one-half acres on this side of the highway shown he had established a trailer park and residence and he had cleared another two and a half acres in this corner. In this area here the Martin Estate had leased the area outlined in blue to the City of Anchorage for the maintenance of facilities used [7] in connection with the operation of Merrill Field. The area had upon it buildings by way of hangars and places to store airplane parts and a parking area for airplanes. Approximately the area outlined here was used as the actual runway for Merrill Field. The rest of the field was lying in this direction, north and south here, and the City of Anchorage had used this small area outlined in red for a garbage dump and that was the extent of the actual uses being made of this land at the time these mineral claims were staked and the mineral claims themselves were made, as follows:

The Anchorage Sand and Gravel Company staked two claims of that description, one of the claims was the area which they had under lease from the Bureau of Land Management and the second claim was adjacent to it here. The Superior Sand and Gravel Mining Company did not itself stake claims. They are assignees of a group known as the Wilcox-Cuddy Group and they staked claims as illustrated. Five of the claims being alleged in their complaints —two of them and this one not being alleged—and the Northern Construction Associates staked four claims which are identical with the quarter sections of the entire section. That is the prestatement of

facts. If the opposing counsel desires to amend it or cite other portions of the statement I will be glad to offer the opportunity.

Now, it is the contention of the Territory that is the pattern of surface use which occurred there, that is the development [8] of this land for commercial purposes. The airport, the area for agricultural purposes on the Martin Estate, and the clearing of the lands and the use for trailer parking on the Bailey tract, illustrate the uses which would be inconsistent with the staking of the claims.

* * *

Mr. Stewart: That is correct. That is the position of the Territory and I believe that that concludes the argument of the Territory upon this motion.

The Court: Do counsel wish to begin their argument at this time or file briefs?

Mr. Arnell: If your Honor please, I don't like to start in and argue now with less than 30 minutes left. I don't like to impose on the Court and personnel. I would suggest if we be permitted the opportunity to a pretrial conference in chambers, we might possibly bring it to some conclusion and avoid the necessity of further argument or filing briefs. I personally would prefer to argue orally. Mr. Manders, I know will argue and we will both blow off the steam we have here in 30 minutes.

The Court: I think the case is the kind that should be briefed but referring to your suggestion for a pretrial conference what time would you suggest that that be held?

Mr. Arnell: Mr. Manders begs it not be held tomorrow, so perhaps some day early next week?

The Court: I don't believe the court's calendar next [9] week is such that would hardly permit it without holding a night session.

Mr. Stewart: Your Honor, the Territory objects to a pretrial conference. The issues are clearly drawn and are properly presented in open court upon the arguments upon the motion and I do not see the necessity of meeting in chambers to consider facts where there are no facts in issue.

Mr. Arnell: If your Honor please, Mr. Stewart has introduced a lot of facts in his statement here. I am only trying to dispose of this matter at the convenience of the court. I think it is not only the duty but a courtesy of Mr. Stewart to not stand here and say not do anything. I think it is up to all of us to cooperate on the matter and if we can avoid writing briefs on this maybe it would be burdensome to us. We have listened for two and a half hours to a resume of a lot of statutes and cases and to put in a brief would be on three cases and I don't think we should burden the court or ourselves if we can avoid it.

The Court: I don't think it is a case of discourtesy, I think it is a case of determining now whether there are any issues of fact because if there are no issues of fact, and that is the position of counsel for the Territory, then a pretrial conference would not only be superfluous but entirely futile.

Mr. Arnell: Well, I think, your Honor, that we could present our views as to what the law upon

these various phases are even though perhaps [10] no——

The Court: Certainly that remains—I mean so far as a pretrial conference of course is concerned —with the issues of fact and if the only question before the Court is now whether you agree with counsel for the Territory that there is no issue of fact in which case then, the argument would be limited to the questions of law that are presented. If you disagree with counsel for the Territory that there are no issues of fact, you have to point out the issues of fact.

Mr. Arnell: As far as the statement of fact, as made by Mr. Stewart, your Honor, I pointed out before, that he leave you with his statement, not to the fact that is incumbent in this particular area, but to the nature and extent of the use.

The Court: I don't know that I follow you. You mean you do not dispute that use of the kind referred to by counsel for the Territory is being made of these sections but you disagree with him over the character of the use or the extent of the use?

Mr. Arnell: Both character and extent.

The Court: But both character and extent of use it seems to me would be material. The only thing is whether they are uses and whether they are uses regardless of their extent or character which are inconsistent with the location of the same ground as placer claims.

Mr. Arnell: The inconsistency is a matter of fact, your Honor, if we dispute it we have to establish facts which would show that there is no in-

consistency at this time under the law [11] as it existed at that time.

Mr. Stewart: Your Honor, is that not a matter of law—what we are arguing—as to whether or not it is inconsistent? It seems to me that Mr. Arnell is saying that to meet with him if it were a matter of fact. Isn't it a matter of law as to whether or not the use being made is inconsistent with the entry under the mining laws? It seems to me that that is the very issue at law which is clearly presented by these facts. Unless some dispute as to whether or not there was a use being made at that time then there is no issue of fact upon which to meet.

Mr. Arnell: Certainly an issue of fact, your Honor, upon the wording of the statute itself. Mr. Stewart read that particular portion of the section to your Honor and it says, "upon conditions providing for compensation to any Territorial lessee." I don't know any language that could be any plainer than that which would apparently permit the staking of these areas even though they were under lease, provided the lessee was compensated for any improvements. Now, there is no showing that any of the prime parties, in other words, Northern Association or Anchorage Sand and Gravel or Superior Sand and Gravel, have made any attempt to deprive the lessees of their surface rights. There is nothing so far as the court is concerned upon which the lessees at this time can claim compensation but if a lessee can claim compensation for his improvements that implies, I think beyond

all reasonable doubt, that this land could be open by right. [12]

The Court: That is a question of law and I say you are not foreclosed in arguing any legal question presented. That is not the question immediately before the court and the question that concerns me now and clearly presented is whether there is any issue of fact.

Mr. Arnell: I apparently have not made myself clear. Mr. Stewart illustrated to the court this 640 acres was encumbered by a number of leases. That is as far as we are willing to go as to the use made by the leases. Obviously the City of Anchorage uses in excess of 25 and 30 acres of its southwest corner.

Mr. Stewart: I alleged it.

Mr. Arnell: Mr. Bailey uses five acres of his 80. I don't know that the Road Commission is using anything. Anchorage Sand and Gravel is making use of some out there. Mr. Martin is using portions of the southwest corner.

Mr. Stewart: Those to me, too, your Honor, are the relevant facts and there seems to be no dispute about that. The court may wish to fix tomorrow or Monday to complete the arguments.

The Court: Of course, it is not a question of law as far as the inconsistent use is concerned until there is an agreement, until both sides have been heard on the question of inconsistency. In other words, if counsel here contends that his evidence would show that the uses made there are not inconsistent with the use of the land for mining, then

there is an issue of fact as to inconsistency. After the facts are before the court, even though [13] there may be a conflict in them, whether a conflict or a substantial agreement, then a question of law is presented but until it is, it is merely a question of law. Now on the statement of counsel, as I understand him he contends that he has evidence at his disposal that will show that the uses made by the lessees are not such as would be repugnant to mining. Am I correct in that?

Mr. Arnell: Well, your Honor, first of all I don't admit that we are concerned particularly with the uses. I think that is a condition that might arise subsequent to this proceeding. If under the law we would be entitled to establish or proceed to patent under these items then we would, if we ousted any of the lessees from their production of surface rights, have to compensate them for improvements, if they had any on any particular area.

The Court: I think you overlooked something and that is this: I am not attempting to dictate to you what position you should take in this case. If you contend that the inconsistent view is something that is immaterial, then you can waive it and you can make your argument on such as you see fit on the questions of law. If you want to waive some of it because you consider it immaterial, that is for you to decide.

Mr. Arnell: I realize that, your Honor. The only purpose I had in mind in making the suggestion was that perhaps in chambers we could state our position both as to the law and as to [14] the

precedent upon which we rely. Your Honor could then say upon this given set of facts I would apply this law, maybe we could get down to the point—maybe, I think, it is proper for the court to rule in a pretrial conference what law will apply to a given set of facts.

The Court: The application of the law is not the proper subject for a pretrial conference. I think if you take the position that there is nothing but the construction of the law in here that remains, that you should make an argument upon the law, unless of course you want to waive it.

Mr. Arnell: I don't want to waive it.

The Court: I think you will have to make an argument on the law because as I take it unless you want to put in evidence to rebut the evidence that is in the case by the statement of counsel for the Territory then there is nothing remaining but questions of law.

Mr. Arnell: Well, I reserved the right, your Honor, to file affidavits or make a statement when he first made the statement or offered the statement.

The Court: You do not have to reserve it. You still have that right, as I told you, if you want to controvert his statement as to the use made by the lessees why you certainly may have that opportunity.

Mr. Arnell: I do certainly, your Honor, so long as it has been raised as a matter of law, whether I agree with it or not is [15] immaterial.

The Court: If you consider it immaterial, as you indicated a moment ago, you don't have to.

Mr. Arnell: My hindsight might be better than my foresight, though.

Mr. Stewart: May it please the court, if counsel desires to file affidavits or otherwise object to this statement of the uses being made on behalf of the Territory, I should like to suggest that this portion of the argument, which has become a motion for summary judgment if this matter outside the pleadings is admitted, be postponed and be taken up at some different time, but that the argument on the initial portion of the dismissal be completed in the orderly process of the court tomorrow or Monday, whenever it may be, and that it be considered on its merits.

Mr. Manders: Question of mineral character of land?

Mr. Stewart: Yes.

The Court: It can't be Monday unless Mr. Moody is still sick and unable to go on with the trial of the Fowler case Monday and I have to wait until the case of Berg vs. City of Anchorage which I set for a definite time Tuesday. I understand the witnesses have been here three times now and that's the reason I made a definite setting to preclude any further inconvenience and expense so that if the case of Fowler goes on Monday, the rest of this argument will not be heard until Wednesday or Thursday of next week. [16]

Mr. Stewart: May it please the court, this argument was initially set down for the 28th of May and counsel for the Territory came here at that

time to argue it and I presume that counsel for all parties came to the court this afternoon prepared to argue. I don't wish to impose on counsel for opposing parties. I would like to make a suggestion subject to their willingness that it might be completed in the morning.

The Court: Tomorrow morning?

Mr. Stewart: Yes, sir.

Mr. Manders: Mr. Stewart, there was a very good reason why the matter was not heard on the 29th of May and then subsequent to that no judge was sitting in this court.

Mr. Stewart: I am not suggesting that it should have been heard in the meantime but I am saying it was called for that time.

The Court: What do the parties wish in that connection?

Mr. Manders: I will be very frank. I don't wish to be here tomorrow morning. I have been here all week.

Mr. Stewart: It is my understanding, your Honor, that the case now has a priority following some particular matter?

The Court: Following the case that is set for Tuesday. I don't recall the name—it has the word "airmotive" in it.

Deputy Clerk: Airport Machinery vs. Berg.

The Court: I set that at the specific request of the parties and the counsel so that the inconvenience and delay heretofore encountered in obtaining a trial date could be avoided, [17] and I feel I am bound by that commitment.

Mr. Stewart: One other question seems to me not quite clear—whether the balance of the argument which is to take place will be solely on the initial question which the Territory has raised or on the latter portion of it also.

Mr. Manders: What was that?

Mr. Stewart: Do you concede that the argument we will complete will be limited to the question whether sand and gravel is admitted under the mining laws, or whether it goes to the question of prior appropriation and use?

Mr. Manders: Mineral laws and whether it is open to location.

The Court: I think that it is not exactly correct to assume that it should be limited as you mentioned because once a motion to dismiss has been converted into a motion for a summary judgment for reception of evidence outside the motion, and that is the situation here, then the argument is on the motion for summary judgment. But it makes no difference because it would have to include an argument on all the questions that have been made under the motion to dismiss.

Mr. Stewart: Yes, your Honor, I realize that, but I am suggesting the possibility of considering the two points separately. I realize that the court would not want to try the matter piecemeal, but if the opposing parties desire to introduce some [18] evidence——

The Court: They better do it before the argument.

Mr. Stewart: That is all my question is, sir.

The Court: In other words, if the parties now wish to make a showing by affidavit in rebuttal of the statement that has been the subject of some comment here, that you do that before argument.

Mr. Manders: May I address the court? Do I understand Mr. Stewart correctly, that you are pressing the motion for summary judgment or pressing the motion for dismissal?

Mr. Stewart: May it please the court——

The Court: He is bound now by the conversion of the motion to dismiss into one for summary judgment. What is before the court is a motion for summary judgment.

Mr. Manders: This is the first opportunity we have had to say much in regard to this argument. You made mention, Mr. Stewart, that the Territory would be without the revenue, without money from those leases. What is the total revenue the Territory now gets from this land now under lease?

Mr. Stewart: May it please the court, it seems to me that is not a proper subject. I will be glad to confer with counsel in his office and tell him what the facts are.

The Court: If you know now you may state it.

Mr. Manders: Are they leased for rental?

Mr. Arnell: If your Honor please, as long as the leases are here in court and the point has been brought up and as long [19] as Mr. Stewart has raised the equitable questions involved here, I would like to at this time to request the court to require Mr. Stewart to produce the leases and I ask that they be filed as exhibits.

The Court: I think in a matter of this kind there should be a free interchange of information and I don't think there should be any objection to furnishing the figures in order to make the evidence bearing on the question of revenue complete.

Mr. Arnell: I didn't mean he didn't co-operate with me. He has shown me the leases. I think since it has been brought up it should be presented to the court for his ruling.

The Court: He could not have done it before until he discovered that there was no objection to his statement. Now, since there has been no objection to his statement, I think he would be perfectly willing to submit figures as to the revenue derived from these leases. Then it seems to me that the parties may file the affidavits, perhaps do it not later than before ten o'clock Monday morning, because if the Fowler case does not go on we should complete this.

Mr. Manders: You caught me in a corner. That is the one thing I did not want to do.

The Court: You did not want to work Saturday or Sunday?

Mr. Manders: No, I didn't. I have had no vacation of any kind. I can't take it.

The Court: What's the matter with co-counsel? Can't you [20] delegate the work to them?

Mr. Manders: I am perfectly willing that Mr. Arnell——

Mr. Stewart: Mr. Manders has been very considerate to the Territory. He extended time to the Territory twice in which to plead.

The Court: I'm selfish enough to speak for myself. I am leaving here. My last day is next Friday and too many things are converging on the court by reason of delays such as this and the usual condition that I have encountered in the past, even with Judge Dimond here, was that the last few days were bedlam, and I want to avoid a repetition of that. I don't want to prolong this.

Mr. Stewart: I don't want to prolong, but perhaps on the sole question of the facts as to the character of the use there, it would be more profitable, rather than to submit affidavits if we did have a conference with the court on that sole question, that is the facts as to the use, which are the only ones pertinent to this motion.

The Court: That is the only issue of fact that I can see, and it arises only because of counsel's statement that he wishes to dispute it, and, of course, that is a proper subject for a pretrial conference, but when we speak of pretrial conference the time has to be set for that.

Mr. Stewart: Your Honor, yes.

The Court: Well, we might fix that for—I set something for 9:30 Monday? [21]

Deputy Clerk: Yes, sir.

The Court: It would have to be by at least 9:00 o'clock.

Deputy Clerk: Default divorce at 9:30 maybe put it over.

The Court: And then counsel would have to bear

in mind that a pretrial conference would have to be concluded in half an hour.

Mr. Manders: Monday at 9:00 o'clock?

The Court: Yes.

Mr. Manders: Very well.

The Court: We'll resume this case on notice then after the pretrial conference. [22]

June 25, 1953

The Court: What is the status of this case now with reference to resuming argument?

Mr. Stewart: The Territory is ready to proceed, your Honor. I wonder about the absence of one of counsel for one of the parties.

The Court: As I recall, when we recessed this case several days ago counsel for some of the defendants were to determine whether they would controvert the statement you made orally. What is the situation of that now?

Mr. Stewart: Your Honor, that is correct and I believe that the only objection raised was by Mr. Arnell and that he was to have come early to add to the statement if he desired at this time. If you recall, your Honor, in the conference in chambers there was one question brought up concerning whether there was a discovery of any other matter which might be determinable as mineral, and I wish to bring to the Court's attention an item of which it can take judicial notice to show there was no such discovery, so I don't think there is room for controversy on that fact.

The Court: I didn't hear everything you said,

but how do you propose to show that to the Court?

Mr. Stewart: By calling the Court's attention to a matter of judicial record, that is, the mineral claims on file in the Commissioner's office, which would show that only sand and gravel [25] were discovered and not some other valuable mineral as appears in the complaint of Superior Sand and Gravel Mining Company.

The Court: Well, is there any further evidence to be presented by way of affidavits then, or orally?

Mr. Arnell: I understood, your Honor, the other day that I would have the right to make an oral statement with respect to the statement of fact that Mr. Stewart made during the first day of argument in that, he left the inference, your Honor, that there was complete use of this land.

The Court: Before we go into that I just want to inquire of what counsel think about the answer of Mr. Manders? Whom does he represent?

Mr. Arnell: He represents Superior Sand and Gravel, which is the plaintiff in two of these cases. Your Honor, this is a peculiar case for the reason that it is an adverse proceeding. The Saxtons of the Northern Construction Association are legal defendants here and naturally they would like to see the motion of the Territory, upon one or two grounds, sustained because then it would mean that the adverse proceeding was lost and that the matter would revert back to the Land Office. However, on the grounds that are alleged here, you might have to decide for a plaintiff opposing the motion of the Territory.

Mr. Stewart: Your Honor, if I may interpose. Mr. Manders has said, and I think he was correct on this, that he wanted to submit this matter on briefs and perhaps it would be all right to [26] proceed with the argument, and then let the entire matter be further considered on briefs.

The Court: Well, what isn't clear to me is—now it is true that the matter may be submitted on briefs, but how is Mr. Manders going to reply to oral arguments here? Am I to understand that what is presented here this morning is something that he wouldn't be interested in or because of the interest of the several defendants?

Mr. Stewart: No, your Honor, I think he should be represented here.

The Court: Well, it seems to me if it is going to be that way your arguments ought to be summarized in written memoranda and filed later and copies served on him and he may have an opportunity to read them.

Mr. Arnell: I have no objection.

The Court: Well, I think that it will have to be done that way or continue the hearing itself. If there is no objection then it will be understood that the substance of the argument to be made here orally will be embodied in written memoranda and copies served on Mr. Manders so he may be afforded an opportunity to reply. Now, do you wish to present any evidence?

Mr. Arnell: I do, your Honor.

The Court: Well, perhaps that should be done first before your argument.

Thereupon, [27]

ELLSWORTH E. SAXTON

called as a witness on behalf of the Defendants, Northern Construction Association, first being duly sworn, testified as follows:

Direct Examination

By Mr. Arnell:

Q. Mr. Saxton, you are being asked to testify strictly for the purpose of informing the Court as to the nature and extent of the uses that were made by the various lessees in the year 1950 on the land embraced within Section 16, which is commonly termed "school lands." Would you state your full name? A. Ellsworth E. Saxton.

Q. Are you one of the defendants in this adverse proceeding? A. I am.

Q. Where do you live, Mr. Saxton?

A. 1398 Birchwood Street, Airport Heights.

Q. And how long have you lived in that vicinity?

A. Since 1946.

Q. Are you thoroughly familiar with the area known as Section 16? A. Yes, sir.

Q. School section? A. Yes, sir.

Q. Were you familiar with the uses that were made of that land in the year 1950?

A. Very familiar.

Q. At the time you staked the section, did you have knowledge [28] of the existence of any leases?

A. Yes, sir, I did.

(Testimony of Ellsworth E. Saxton.)

Q. Would you state which leases you had knowledge of?

A. I had knowledge of the City lease. I had knowledge of the Asa Martin lease, but I did not know of the Bailey lease at that time.

Q. Can you state briefly how much of the area that was leased to Mr. Martin was actually placed in use by him?

A. I believe there previously had been placed in use some 16 acres, but at that time none of it was in use.

Q. Do you know the approximate date——

The Court: Well, it isn't clear as to what time Martin leased it. You say "at that time none of it was used," well, that doesn't furnish the time you are referring to.

A. 1950.

Q. Approximately how many acres were embraced in the Martin lease?

A. I believe there were 240 acres.

Q. Are you familiar with the lease which was given to Mr. Bailey?

A. I have since become familiar with it.

Q. Are you familiar with the area—the land that is embraced in that lease? A. I am.

Q. Approximately how much of his 80 acres was placed in use now? A. Now or——

The Court: How much of his 80 acres—whose 80 acres? [29]

Mr. Arnell: Mr. Bailey's.

(Testimony of Ellsworth E. Saxton.)

The Court: There isn't anything in the evidence now.

Mr. Stewart: I think in my statement of fact I cited there was a lease to Mr. Bailey in October, 1950, and that it contained approximately 80 acres.

The Court: Well, that is the consequence of trying a case piecemeal. You can't remember everything that was testified to several days ago. You may proceed.

Q. (By Mr. Arnell): Do you know, Mr. Saxton, how much of that particular leasehold was in use by the lessee in 1950?

A. In 1950 he had two small—Mr. Bailey had two small areas under use. It consisted of a restaurant-dining car near Lang's Store in Mt. View and across the highway to the south he had a few trailers, or had established a place for trailers.

Q. Now, at the present time, Mr. Saxton, is he using any of the leased area south of there?

A. He is——

Mr. Stewart: I object to that on the ground that it is irrelevant to the issues at the time staking took place.

The Court: Well, his question didn't fix any time. It fixed the location. I am unable to recognize his statement—one as to place and yours as to time.

Mr. Stewart: Your Honor, the issue before the court is whether at the time the claims were staked there was a prior [30] appropriation of this ground so that the only relevancy as to uses is as to the use at the time claims were staked, which is Octo-

(Testimony of Ellsworth E. Saxton.)

ber, 1950; it would be immaterial as to what use is being made of it now.

Mr. Arnell: Your Honor, please, Mr. Stewart, has spent a great deal of time arguing inconsistencies of the uses that would exist. Assuming that one of the other of these people, or appropriators, would start to use the property for mining purposes which is in existence I think under the statute that is strictly permissible that comes under inconsistencies of the use. My question was directed to the extent of use and would show that Mr. Stewart's argument as to inconsistencies of the use would not stand up, particularly in light of the provision of the 1939 law that permitted the appropriation for supposed mining purposes under the mining laws of the United States.

The Court: I don't think he objects to your showing the uses or the extent of the uses, but he objects to showing the uses made and existing on the location of these claims, isn't that right?

Mr. Stewart: I withdraw the objection. I don't think the result is of any substantial value to result in legal argument.

The Court: But your question sounded as though it was directed to some area outside of this section.

Mr. Arnell: No; it is all within this section, your Honor.

The Court: Well, you mentioned to the south or outside. [31]

Mr. Arnell: Well, that is true. I mean, south of

(Testimony of Ellsworth E. Saxton.)

the area actually being used in 1950 which still was in the area leased by that particular lessee.

The Court: Very well.

Q. (By Mr. Arnell): Mr. Saxton, if you know, will you state whether or not Mr. Bailey, a lessee from the Territory, is making any greater use now of the area embraced within the lease than he did in 1950 at the time these claims were staked?

A. I am not sure I understand.

Q. Well, is he using any more land now than in 1950? A. Oh, yes.

Q. If so, how much?

A. I'd say perhaps two and a half acres.

Q. Now, as a total, what would he be using now of the 80 acres? A. Probably three acres.

Q. Is the rest of that particular lease vacant and unoccupied and unused?

A. Yes, sir, it is. It is brush.

Q. Do you know, Mr. Saxton, what area the City had under lease in 1950?

A. Yes, I do. The south one-half, I believe, is the way the lease read, although I never read it—they told me.

Q. Now, whose lease is this?

A. City of Anchorage. [32]

Q. Were there any operations being conducted on the south half at that time also?

A. Aside from the City, none.

Q. Was Anchorage Sand and Gravel conducting any mining operations, excavation operations there?

A. Yes, they were.

(Testimony of Ellsworth E. Saxton.)

Q. Approximately—the year 1950, how much of the south half was the City actually using?

A. Approximately 25 acres.

Q. That is embraced in the garbage dump and also in the Merrill Field Runway?

A. I would say that would be about right for that area, 25 acres.

Q. To your knowledge, does the City make any use of any other south half at that time or since that time?

A. No, they have not, to my knowledge.

Q. Presently are there any gravel excavation operations going on in the south half?

A. Anchorage Sand and Gravel, The Road Commission and various mining operations going on. I don't know just what all.

Q. Approximately what distance are those operations that is actually used by the City?

A. Half a mile, perhaps.

The Court: Would you state, Mr. Saxton, how far the operation just described is from the area that is actually used now by the City? [33]

A. About half a mile.

Q. Closest surface, that is the closest operation that is used by the City? A. That is right.

Mr. Arnell: I believe that is all.

Mr. Stewart: One question, your Honor.

(Testimony of Ellsworth E. Saxton.)

Cross-Examination

By Mr. Stewart:

Q. Did you have knowledge that the Road Commission was using a gravel pit in this area in October, 1950?

A. I don't believe they were using it in October, but they had used it previously.

Q. It had been used? A. Yes.

Mr. Stewart: That is all. Your Honor, I have no objection to the statement.

Mr. Arnell: That is all.

The Court: Have you any other evidence to put on?

Mr. Arnell: No.

The Court: Then you may proceed with the arguments. [34]

United States of America,
Territory of Alaska.

I, Iris L. Stafford, Official Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcript of excerpts of the proceedings had on Motion to Dismiss in the above-entitled matter taken by me in stenograph in open court at Anchorage, Alaska, on the 25th of June, 1953, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD. [35]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designations of counsel, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, including the transcript of record on appeal of excerpts of proceedings on motion to dismiss, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above-entitled cause by the above-entitled Court on September 15, 1953, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ WM. A. HILTON,
Clerk of the District Court for the District of Alaska, Third Division.

[Endorsed]: No. 14190. United States Court of Appeals for the Ninth Circuit. Superior Sand and Gravel Mining Co., Inc., a Corporation, Appellant, vs. Territory of Alaska, Appellee, and Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr., Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton and Grace D. Saxton, Co-Partners Doing Business as the Northern Construction Association, and Ellsworth E. Saxton, as Agent for Said Association, Appellants, vs. Territory of Alaska, Appellee. Transcript of Record. Appeals from the District Court for the District of Alaska, Third Division.

Filed January 8, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, Ninth Circuit

No. 14190

SUPERIOR SAND AND GRAVEL MINING CO., INC., a Corporation,

Plaintiff and Appellant,

vs.

TERRITORY OF ALASKA,

Defendant and Appellee.

VERNON C. SCHUBERT, et al.,

Defendant and Appellant,

vs.

TERRITORY OF ALASKA,

Defendant and Appellee.

NOTICE OF ADOPTION OF STATEMENT OF POINTS AND DESIGNATION OF RECORD

Superior Sand and Gravel Mining Co., Inc., a corporation, plaintiff and appellant in the above-entitled action, does hereby adopt its statement of points and designation of record appearing in the typewritten transcript of record in the above-entitled matter.

Dated at Anchorage, Alaska, this 12th day of January, 1954.

/s/ JOHN E. MANDERS,

Attorney for Superior Sand and Gravel Mining Co., Inc., Plaintiff and Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 15, 1954.

[Title of Court of Appeals and Cause.]

Nos. A-8325, A-8422 and A-8423

ADOPTION OF STATEMENTS

Now come the appellants, Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr., Lillian E. Smith, Eugene E. Saxton and Grace D. Saxton, associated as the Northern Construction Association, and Ellsworth E. Saxton, as agent for said association, pursuant to the provisions of Rule 17-6 of this Court, by their attorney of record, E. L. Arnell, and hereby adopt as their statement of points to be relied upon in this appeal the statement of points which heretofore was filed in the District Court for the District of Alaska, and which heretofore has been filed as a part of the typewritten transcript on appeal.

Dated at Anchorage, Alaska, this 13th day of January, 1954.

/s/ E. L. ARNELL,
Attorney for Northern
Construction Association.

Receipt of copy acknowledged.

[Endorsed]: Filed January 23, 1954.